

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 98-0316
SALES AND USE TAX
FOR TAX PERIODS: 1994

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1. Sales and Use Tax: Contract for Sale of Services and Tangible Personal Property

Authority: IC 6-2.5-3-2, IC 6-2.5-2-1, IC 6-2.5-4-1, IC 6-2.5-1.1, IC 6-2.5-5-3 (b), 45 IAC 2.2-1-2.

Taxpayer protests the imposition of tax on a maintenance agreement.

2. Tax Administration: Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b).

Taxpayer protests the imposition of the penalty.

Statement of Facts

The taxpayer of record is a partnership. After an audit, the Indiana Department of Revenue assessed additional use tax, interest and penalty on one division of the partnership. The taxpayer protested the assessment and two issues remained at the time of the hearing. Further facts will be provided as necessary.

1. Sales Tax: Contract for Sale of Services and Tangible Personal Property

Discussion

Pursuant to a contract, the taxpayer provided maintenance, parts and consumables (except diesel fuel) for slab haulers that another corporation rented from a third party. The audit considered the contract a service agreement and assessed use tax on the tangible personal property that the taxpayer supplied to the other corporation while performing maintenance activities on the slab carriers pursuant to IC 6-2.5-3-2. The taxpayer protested this assessment.

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1. Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales or use tax. IC 6-2.5-1-1.

The contract between the taxpayer and the other corporation recites the duty of the taxpayer at Paragraph 3.1 of the contract as follows:

From and after the date on which (the other corporation) commences to use the slab carriers, (the taxpayer) shall:

- (a) keep the slab carriers in good condition and working order as provided in Paragraph 6.1 and perform all maintenance and repair in accordance with relevant instructions of the manufacturer (another corporation), and in accordance with the requirements of any equipment lease which may be entered into for the slab carriers by (the other corporation) (the things to be done by (the taxpayer) pursuant to this Paragraph 3 being hereafter called the "Services");
- (b) provide all labor, equipment and an adequate inventory of spare parts required for the maintenance and repair of the slab carriers and furnish all consumables required by them, including but not limited to tires, oil (other than diesel fuel), hydraulic fluids and grease; and
- (c) establish and conduct a preventive maintenance program, including but not limited to routine oil analysis.

The terms of the contract make it clear that the taxpayer is providing both services and tangible personal property. The services include the routine maintenance of the slab carriers, the labor used in repairing the slab carriers and the designing and implementation of a routine maintenance program for the slab carriers. The tangible personal property provided includes tires, oil, hydraulic fluids and grease.

The gross retail taxation of service contracts is clarified at 45 IAC 2.2-4-2 as follows:

- (a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services,

or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

- (1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
- (2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
- (3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
- (4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

In the taxpayer's situation, it is clear that the taxpayer is performing services on property that the taxpayer doesn't own and transferring tangible personal property pursuant to a contract. The tangible personal property, tires, etc., appears to exceed ten per cent (10 %) of the value of the contract and the taxpayer did not pay use tax on it at the time of acquisition.

Evidence indicates that the other corporation gave the taxpayer a direct pay permit. Any corporation that applies to the Indiana Department of Revenue may be granted a direct pay permit at the Indiana Department of Revenue's discretion. Retail merchants who receive a direct pay permit from another corporation are not required to collect and remit the sales tax on tangible personal property which they sell to the grantor of the direct pay permit. IC 6-2.5-8-9. Therefore, the taxpayer was not required to collect and remit sales tax on the tangible personal property sold to the other corporation.

Finding

The taxpayer's protest is sustained subject to audit verification that the property transferred exceeded 10% of the contract amount.

2. Tax Administration: Penalty

Discussion

The taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws,

rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

Although the taxpayer's protest was sustained, there remain other assessments that the taxpayer did not protest. These assessments included such items as office supplies, rags and a tool rest. The rules concerning the payment of use tax on such items are clear and easily accessible in Indiana Department of Revenue publications. The taxpayer's failure to self assess and remit use tax on these clearly taxable items constitutes negligence.

Finding

The taxpayer's final point of protest is denied.

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